

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TODD L. MITCHELL
Claimant

VS.

PETSMART, INC.
Respondent

AND

ROYAL & SUNALLIANCE INSURANCE COMPANY
and TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA
Insurance Carriers

Docket Nos. 1,015,618
& 1,019,828

ORDER

Respondent and one of its insurance carriers, Travelers Property Casualty Company of America, appealed the April 20, 2007, Award entered by Special Administrative Law Judge Marvin Appling. The Workers Compensation Board heard oral argument on July 20, 2007, in Wichita, Kansas.

APPEARANCES

Michael Snider of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Wichita, Kansas, appeared for respondent and Royal & SunAlliance Insurance Company (Royal). Brian R. Collignon of Wichita, Kansas, appeared for respondent and Travelers Property Casualty Company of America (Travelers).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record includes the written stipulation regarding additional compensation items that the parties filed on November 21, 2006, with the Division of Workers Compensation.

ISSUES

Claimant alleges he fell and injured himself at work on December 31, 2003, and each day worked thereafter. He also alleges he injured himself at work on July 18, 2004, and each day worked after that date. The parties agree Royal was respondent's workers compensation insurance carrier for purposes of these claims through January 31, 2004, when Travelers began insuring respondent.

On December 31, 2003, claimant fell at work and injured his left thumb. While continuing to work for respondent, claimant developed right carpal tunnel syndrome and other symptoms in his right upper extremity along with additional symptoms in his left upper extremity. Whether those later problems and symptoms are the direct and natural consequence of the left thumb injury or whether they comprise new and distinct accidents apart from the thumb, claimant argued that he was entitled to receive permanent disability benefits for his bilateral upper extremity injuries under K.S.A. 44-510e.

In the April 20, 2007, Award, Judge Appling held the date of accident for claimant's bilateral upper extremity injuries was December 31, 2003. The Judge awarded claimant a 55 percent permanent partial disability, which was based upon a 25 percent wage loss and an 86 percent task loss. Moreover, the Judge found the injuries that claimant sustained after the left thumb injury were a natural and probable consequence of that injury and that both Royal and Travelers were jointly and severally liable.

Travelers appealed. Travelers contends the Judge erred by finding it jointly and severally liable for claimant's benefits. It argues the Judge determined December 31, 2003, was the sole accident date and, therefore, it should not be responsible for an accident that occurred more than a month before its coverage commenced. In short, Travelers argues all the liability in these claims should be assessed against Royal as the injuries claimant developed following the thumb injury, which occurred during Royal's coverage period, were the natural consequence of that injury.

Travelers also contends the Judge erred by awarding claimant permanent disability benefits under K.S.A. 44-510e rather than under the schedules of K.S.A. 44-510d. And as the presumption of permanent total disability has allegedly been rebutted, Travelers contends claimant should receive separate awards of permanent disability for each separate scheduled injury (which could potentially be six for the left thumb, right shoulder, left shoulder, right arm carpal tunnel syndrome, right elbow cubital tunnel syndrome, and left arm carpal tunnel syndrome) he sustained using the functional impairment ratings provided by Dr. Pat D. Do. Finally, Travelers requests these claims be remanded to the Judge to determine the amounts it should be reimbursed by Royal.

Conversely, Royal contends the Judge erred by finding all of claimant's bilateral upper extremity injuries were the natural consequence of the December 31, 2003, accident and resulting thumb injury. Instead, Royal argues it is responsible for the left thumb injury only and Travelers is responsible for claimant's other upper extremity injuries because they developed as the result of the work he performed after his thumb injury. But Royal agrees with Travelers that claimant's permanent disability benefits should be computed as scheduled injuries under K.S.A. 44-510d.

Claimant contends the Award should be affirmed. Claimant believes his injuries comprise a bilateral peripheral nervous system disorder, which the fourth edition of the *AMA Guides*¹ measures in terms of a whole person impairment. Accordingly, claimant argues the *Guides* must be followed and, therefore, his injuries should be compensated not as multiple scheduled injuries but, instead, under the provisions of K.S.A. 44-510e. In the event the Board would find claimant has sustained multiple scheduled injuries, claimant requests these claims be remanded for additional evidence.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injuries and disability?
2. What is the liability of Royal and Travelers?
3. Should the Board remand these claims to the Judge for additional evidence?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in June 2002. On December 31, 2003, claimant fell at work and fractured his left thumb. There is no dispute that claimant's December 2003 accident arose out of and in the course of his employment with respondent.

Despite receiving left thumb surgery in early January 2004, claimant missed no work and continued to perform his regular job duties as a merchandise manager. Moreover, for approximately 12 weeks claimant worked using his right arm only because for a good part of that time his left upper extremity was immobilized by a cast that went up to his elbow.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Approximately 12 weeks after the thumb surgery, in early April 2004, claimant's doctor released him from medical treatment without restrictions.

Claimant's job with respondent included, among other duties, unloading pallets of dog food. Three times a week pallets loaded with 30- to 50-pound bags of dog food arrived at the store where claimant worked. After the left thumb injury, claimant handled those bags with his right arm. Moreover, even after the doctor released him, claimant continued to protect his left arm by overcompensating with his right arm. By July 2004, claimant was experiencing numbness in both hands, the right worse than the left. In addition, claimant would awaken at night with severe right shoulder pain. Claimant reported his symptoms to respondent and was referred to a Minor Emergency clinic.

By October 2004, claimant realized he had genuine problems in both upper extremities. Eventually claimant was referred to Dr. Bernard F. Hearon, who found a SLAP lesion in claimant's right shoulder. In January 2005, Dr. Hearon performed surgery on claimant's shoulder. In the meantime, claimant continued to experience numbness in his hands and he also developed symptoms in his right elbow and left shoulder.

Before his medical treatment concluded, claimant underwent right carpal tunnel release surgery in August 2005 and he was offered surgery to mend a SLAP lesion in his left shoulder and left carpal tunnel release surgery. Because of disappointing results from the right shoulder surgery and right carpal tunnel release, claimant has declined both carpal tunnel release surgery and shoulder surgery on his left arm.

After the right shoulder surgery, respondent transferred claimant from its west Wichita location to its east Wichita location. Claimant worked at the east location from approximately May 1, 2005 through July 15, 2005, when he was terminated. Claimant remained unemployed until mid-March 2006, when he began working for a temporary employment agency.

There is no dispute that on February 1, 2004, which was during claimant's recovery from the thumb surgery, Travelers replaced Royal as respondent's workers compensation insurance carrier. Consequently, claimant injured his thumb when Royal was on the risk but the bilateral carpal tunnel syndrome symptoms, bilateral shoulder symptoms, and right elbow symptoms surfaced after Travelers became respondent's workers compensation insurance carrier.

Judge Barnes selected Dr. Pat D. Do to evaluate claimant. According to claimant, the doctor spent five minutes or less examining him. Moreover, claimant testified Dr. Do did not examine his right elbow or left hand. In addition, claimant testified the doctor indicated he was not interested in examining claimant's hands, but only his shoulders.

Indeed, Dr. Do, who examined claimant in April 2006, did not rate claimant's left upper extremity for the carpal tunnel syndrome or the right upper extremity for the cubital tunnel syndrome as claimant allegedly did not complain about those problems. The doctor noted claimant had a right carpal tunnel release, a left thumb ligament repair, a right shoulder subacromial decompression (which included repairing the rotator cuff, excising the distal clavicle, and repairing a tear in the labrum), and left shoulder pain. For the left thumb injury, the doctor rated claimant as having a nine percent impairment to the thumb, which comprised a four percent impairment to the left hand and a four percent impairment to the left upper extremity. For the left shoulder, the doctor rated claimant as having a one percent impairment to the left upper extremity. And for the right carpal tunnel release, the doctor rated claimant as having a five percent impairment to the right upper extremity. Finally, for the right shoulder injury and surgery, the doctor concluded claimant had an eight percent impairment to the upper extremity. Dr. Do utilized the fourth edition of the *AMA Guides* in rating claimant's impairment.

Claimant told Dr. Do that after the right shoulder surgery his left shoulder began hurting as he was using his left arm more. The doctor related all of claimant's injuries to the December 31, 2003, accident and resulting left thumb injury. The doctor testified, in part:

Q. (Mr. Collignon) Okay. Doctor, one of the issues for this case, then, is the progression of the injuries. And ultimately what I was asking of you and what you responded to was a question of whether you believe that the sequence of injuries was such that one injury or each injury was related to the prior injury, in that Mr. Mitchell testified about overuse injuries. Does that make sense?

A. (Dr. Do) Yes, if I'm understanding you right. Can I explain how I understand it?

Q. Yeah. How do you understand that?

A. I understand he had a left thumb injury from his -- after his left thumb injury he had to do a lot of work for PETsMART using 50-fifty pound things as Mike had mentioned before lifting overhead 50 pounds, so because of that he started having right shoulder complaints, and with overuse and using his right hand because he's compensating for his left, he's developing shoulder pain on the right and numbness on the right, so after he has surgery for his right shoulder and right carpal tunnel, now he's overusing his left arm to make up for his recent right shoulder surgical insult, if you want to call that, so he started having left shoulder pain is the way I understand his history.

Q. Okay. And based on that history, were you able to render an opinion as to whether the various injuries all arose out of the initial injury to the left thumb?

A. More likely than not, yes.

Q. Okay. And what is that opinion?

A. That most of his needs for his right shoulder, right carpal tunnel, left shoulder, arose out of his left thumb injury.²

Dr. Pedro A. Murati evaluated claimant at his attorney's request. The doctor examined claimant the first of three times in May 2004 after claimant had been released from medical treatment following his thumb surgery. He next examined claimant in mid-October 2004 shortly after claimant had developed right shoulder pain and bilateral carpal tunnel symptoms. And he last examined claimant in December 2005.

Using the fourth edition of the *AMA Guides*, Dr. Murati measured the impairment in claimant's right shoulder at 10 percent to the upper extremity due to the subacromial decompression, 10 percent to the upper extremity due to the distal clavicle excision, and three percent to the upper extremity due to lost range of motion. The doctor concluded claimant had a 10 percent impairment to his right upper extremity from the carpal tunnel syndrome and surgery and a 10 percent impairment to the upper extremity for right ulnar cubital tunnel syndrome. Combining those ratings, the doctor found claimant had a 36 percent impairment to the right upper extremity.

For the left carpal tunnel syndrome, Dr. Murati determined claimant sustained a 10 percent impairment to the upper extremity. And for the left shoulder injury, the doctor concluded claimant sustained an additional six percent impairment to the upper extremity. In all, the doctor found claimant's left upper extremity impairment was 15 percent.

For the left thumb injury, Dr. Murati rated claimant as having a 32 percent impairment to his hand.

According to Dr. Murati, claimant's bilateral carpal tunnel syndrome, the bilateral shoulder problems, and the cubital tunnel syndrome in the right elbow would have been made worse each day he performed his normal work. The doctor testified, in part:

Q. (Mr. Emerson) Now, is carpal tunnel syndrome a repetitive traumatic condition that continues to cause the claimant to sustain mini traumas each day he engages in work activities?

A. (Dr. Murati) Yes.

Q. And in looking at items numbered 4, 5 and 6 under the impression section, talking about right ulnar cubital syndrome, the slap lesion, essentially, if I were to

² Do Depo. at 37, 38.

just read from your report, you indicate on those, Probable right ulnar cubital syndrome. Status post right arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision, and repair of SLAP lesion. Left shoulder pain secondary to labral lesion.

What I want to know about those particular items, if those are conditions which will continue to be made worse each day the claimant engages in his normal work activities?

A. Yes.³

There is no dispute claimant fell and injured his thumb on December 31, 2003, while performing his work duties for respondent. Consequently, that is the date of accident for the thumb injury and Royal is responsible for all of the medical treatment administered to the thumb, any temporary total disability compensation due claimant for the thumb injury, and the permanent disability compensation due claimant for the permanent impairment to the thumb.

The Board is not persuaded that either Dr. Do's or Dr. Murati's impairment ratings are more credible than the other's. Dr. Do rated claimant's left thumb impairment at nine percent. Dr. Murati, on the other hand, rated claimant's left hand at 32 percent due to the thumb injury but he did not provide a rating specifically for the thumb. The fourth edition of the *AMA Guides*, however, converts a 32 percent impairment to the hand to a 79 to 81 percent impairment to the thumb. Averaging Dr. Do's nine percent rating with the 79 to 81 percent rating from Dr. Murati yields a 44.5 percent impairment for the thumb. Therefore, the Board finds claimant has sustained a 44.5 percent impairment to his thumb for which he is entitled to receive permanent disability benefits under the schedules of K.S.A. 44-510d.

The evidence establishes that when claimant returned to work after his thumb injury he developed additional repetitive trauma injuries, including bilateral carpal tunnel syndrome, right cubital tunnel syndrome, and bilateral shoulder injuries. The evidence establishes that those subsequent injuries developed due to the combination of claimant's work and his attempts to compensate for his injuries. For example, when claimant first returned to work after the thumb surgery, he unloaded pallets of heavy bags of dog food with his right arm only, which became symptomatic. And when he compensated for the right shoulder pain, he began using his left arm more, which also became symptomatic. The testimony from Dr. Murati establishes that claimant's work contributed to claimant's ultimate injuries. And the testimonies of claimant and Dr. Do establish how those injuries were related to the initial thumb injury.

³ Murati Depo. at 40, 41.

Moreover, it cannot be said those additional repetitive trauma injuries to claimant's arms and shoulders would have occurred without the strenuous work that claimant performed after his thumb surgery. Likewise, it cannot be said claimant would have developed those injuries without the initial thumb injury. Consequently, the Board finds and concludes *the combination of claimant's work activities and his initial thumb injury* resulted in claimant developing bilateral carpal tunnel syndrome, right elbow symptoms, and bilateral shoulder injuries. Therefore, both Royal and Travelers should be jointly and severally liable for the medical treatment and the disability compensation relative to those injuries.

Injuries to both arms and shoulders are now compensated under the schedules of K.S.A. 44-510d.⁴ The Board rejects claimant's argument that these injuries should be compensated under K.S.A. 44-510e merely because the fourth edition of the *AMA Guides* may measure an impairment in terms of a whole person impairment. The *AMA Guides* measures the impairment. But the Workers Compensation Act determines whether an injury is compensated under K.S.A. 44-510d or K.S.A. 44-510e.

The Board finds claimant has sustained repetitive trauma injuries to both his right and left upper extremities. The evidence indicates that such repetitive trauma was continued through claimant's last day of working for respondent, which was July 15, 2005. Therefore, the date of accident for the bilateral upper extremity injuries (other than the left thumb) is July 15, 2005.

As indicated above, the Board is not convinced that one doctor's ratings are any more credible than the other's. The Board averages the ratings Dr. Do and Dr. Murati provided for claimant's right upper extremity and finds claimant has a 24.5 percent impairment to that upper extremity at the shoulder level. Likewise, the Board averages the ratings, excluding the rating for the thumb, of the same two doctors and finds claimant has sustained an eight percent impairment to the left upper extremity at the shoulder level.

Based upon the above, the April 20, 2007, Award should be modified. The Board denies claimant's request that these claims should be remanded to the Judge for additional evidence.

AWARD

WHEREFORE, the Board modifies the April 20, 2007, Award entered by Special Administrative Law Judge Marvin Appling, as follows:

⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

Left Thumb

Todd L. Mitchell is granted compensation from Petsmart, Inc., and Royal & SunAlliance Insurance Company for a December 31, 2003, accident and resulting disability. Based upon an average weekly wage of \$560.90, Mr. Mitchell is entitled to receive 26.70 weeks of permanent partial disability benefits at \$373.95 per week, or \$9,984.47, for a 44.5 percent permanent partial disability to the left thumb, making a total award of \$9,984.47, which is all due and owing less any amounts previously paid.

Respondent and Royal & SunAlliance Insurance Company are liable for the medical treatment and disability compensation related to the left thumb injury.

Left Arm

Todd L. Mitchell is granted compensation from Petsmart, Inc., and Royal & SunAlliance Insurance Company and Travelers Property Casualty Company of America for a July 15, 2005, accident and resulting disability. For the period ending July 31, 2005, based upon an average weekly wage of \$576.32, Mr. Mitchell is entitled to receive 2.29 weeks of permanent partial disability benefits at \$384.23 per week, or \$879.89.

For the period commencing August 1, 2005, based upon an average weekly wage of \$640.31, Mr. Mitchell is entitled to receive 15.71 weeks of permanent partial disability benefits at \$426.89 per week, or \$6,706.44, for an eight percent permanent partial disability to the left arm, making a total award of \$7,586.33, which is all due and owing less any amounts previously paid.

Respondent, Royal & SunAlliance Insurance Company, and Travelers Property Casualty Company of America are jointly and severally liable for the medical treatment and disability compensation related to these left upper extremity injuries.

Right Arm

Todd L. Mitchell is granted compensation from Petsmart, Inc., and Royal & SunAlliance Insurance Company and Travelers Property Casualty Company of America for a July 15, 2005, accident and resulting disability. For the period ending July 31, 2005, based upon an average weekly wage of \$576.32, Mr. Mitchell is entitled to receive 2.29 weeks of temporary total disability benefits at \$384.23 per week, or \$879.89.

For the period commencing August 1, 2005, based upon an average weekly wage of \$640.31, Mr. Mitchell is entitled to receive 15.71 weeks of temporary total disability benefits at \$426.89 per week, or \$6,706.44, plus 50.72 weeks of permanent partial disability benefits at \$426.89 per week, or \$21,651.86, for a 24.5 percent permanent partial

disability to the right arm, making a total award of \$29,238.19, which is all due and owing less any amounts previously paid.

Respondent, Royal & SunAlliance Insurance Company, and Travelers Property Casualty Company of America are jointly and severally liable for the medical treatment and disability compensation related to these right upper extremity injuries.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and their determination of claimant's dates of accident and the liability of the insurance carriers. However, we disagree with the majority's conclusion that some of claimant's percentages of impairment for his scheduled injuries should be combined. We read *Casco*⁵ to require these injuries to be compensated as separate injuries.

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

determine what the law should or should not be. *Foos*, 277 Kan. at 695. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15, 81 P.3d 425 (2003).⁶

The *Honn* court's interpretation of the statute did not follow a key tenet of statutory construction – courts cannot add something to a statute that is not readily found in the language of the statute.⁷

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

. . . .

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.⁸

Applying the “secondary injury rule,” the Supreme Court in *Casco* found claimant sustained simultaneous injuries to his bilateral upper extremities (shoulders). Nevertheless, instead of combining the permanent impairment of function percentages for these two shoulder injuries into a single percentage of functional impairment to the body as a whole, the court concluded that “the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.”⁹

In *Casco*, when discussing *Honn*¹⁰ and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

⁶ *Id.* at 521.

⁷ *Id.* at 525.

⁸ *Id.*, Syl. ¶¶ 7, 9.

⁹ *Id.*, Syl. ¶ 9.

¹⁰ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waved home and exempted from traversing to second and third bases, thus improperly converting a single into a home run.¹¹

The majority, by combining some of the separate scheduled injuries, is reading something into K.S.A. 44-510d that is not in there and, in effect, converting several base hits (singles?) into a single single.

Because the fingers, hand, forearm, arm and shoulder are each contained within the schedule of K.S.A. 44-510d(a), claimant's disabilities must each be compensated according to the schedule at the level that corresponds to that injury, regardless of whether the injuries occurred separately, simultaneously or as a result of a natural progression.

BOARD MEMBER

BOARD MEMBER

- c: Michael Snider, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and Royal
Brian R. Collignon, Attorney for Respondent and Travelers
Nelsonna Potts Barnes, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge

¹¹ *Casco* at 527.